

CROWN LAND MANAGEMENT ACT 2016

Guideline—vesting Crown land in local councils

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More information

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Overview

This guideline sets out a framework to enable appropriate and consistent vesting of transferrable Crown land in local councils (councils) under Division 4.2 of the *Crown Land Management Act 2016* (the CLM Act).

This guideline applies to local councils and the NSW Department of Industry—Lands & Water (the department).

Division 4.2 of the CLM Act provides for the Minister for Lands to vest locally significant Crown land in councils to then own and manage under the *Local Government Act 1993* (LG Act). This provision is intended to be used almost exclusively under the Land Negotiation Program (the program). Outside the program, councils still have the ability to apply for locally significant Crown land to be vested in them, and this may occur in limited circumstances, as set out in this guideline.

Assistance

For assistance, please contact the NSW Department of Industry—Lands & Water business centre.

Phone: 1300 886 235

Vesting Crown land in councils

Division 4.2 of the CLM Act enables the Minister for Lands and Forestry to vest ‘transferrable Crown land’ to councils to then own and manage under the LG Act.

Vesting Crown land involves transferring the title of Crown land to the new owner and does not require payment of money by the new owner. Transferrable Crown land refers to dedicated or reserved Crown land. The land must also be wholly located within the local government area of the council.

Crown land will only be transferred to councils under this provision when the minister is satisfied the land is suitable for local use in accordance with the local land criteria set out in the Crown Land Management Regulation 2018 (the CLM Regulation), and when a number of other considerations outlined in this guideline have been addressed.

Any third-party interests, such as leases or licences, on the Crown land will remain in place when the land is transferred and the council will become the landlord/licensor.

Division 4.2 is intended to be used almost exclusively as part of the program, which is explained in detail under ‘Vestings under the Land Negotiation Program’ in this guideline. However, where there is an exceptional local need, councils can submit an application to the department seeking a vesting of land outside of the program. The limited circumstances where an application of this nature will be considered are set out under ‘Vestings to address an exceptional local need’.

For all vestings under Division 4.2, certain considerations apply, as set out in the criteria in the following pages.

Local land criteria

Land can only be vested where it is ‘suitable for local use’, having regard to the criteria in Clause 26 of the CLM Regulation (the local land criteria). Councils must justify that the Crown land they are interested to own and manage meet the local land criteria.

The prescribed local land criteria are whether the land:

1. provides, or has demonstrated potential to provide, a ‘public good’ predominantly for residents in the local government area of the local council concerned, or in adjacent local government areas, in a way that is consistent with local planning instruments
2. use is consistent with the functions of local government or could be used for activities consistent with those functions
3. is managed, or has identified potential to be managed, as a community asset by a local council or some other body.

Additional criteria apply to racecourses on Crown land when determining if they are suitable for local use. This criterion requires the minister to take into account the opinion of the Minister for Racing as to whether the land is of significance to horse racing, harness racing or greyhound racing as a whole in the State.

The department will assess council’s justification against the local land criteria. More information on how this will be assessed, including relevant examples, is set out below. Where it can be demonstrated that the Crown land is suitable for local use, taking into account the fact that the Crown land meets one or more of the criteria, the land could potentially be vested in the council under this provision.

Examples of land that meet the local land criteria

Some examples of land that has the potential to meet each of the local land criteria are outlined below. These examples are a guide to how the department will assess an application from council and are not exhaustive.

Criterion 1—the land provides, or has demonstrated potential to provide, a public good predominantly for residents in the local government area (LGA) of

the council concerned, or in adjacent LGAs, in a way that is consistent with local planning instruments

Examples include land that can be described as:

- providing access to assets and other land enjoyed predominantly by the local community, such as camping grounds and picnic areas
- including infrastructure that provides public benefit predominantly to the local community, such as community centres, public halls, youth centres, sport and recreational centres
- earmarked for the provisions of the assets or infrastructure set out above, noting that for proposed future developments the department will require evidence of approved planning consents and budget funds.

Criterion 2—the land use is consistent with the functions of local government or could be used for activities consistent with those functions

Examples include land that can be described as:

- including infrastructure for delivery of local government services, such as waste management facilities, sewerage depots, wastewater treatment plants
- used for provision of local services such as stormwater drainage, fresh water access, asset protection zones, flood and hazard management, buffer zones between residential and industrial, and to limit encroachment on community land
- could be used for the above infrastructure or services, noting that for such land the department will require evidence of approved planning consents and budget funds.

Criterion 3—the land is managed, or has identified potential to be managed, as a community asset by a council or some other body

Examples include land that can be described as:

- already under the care, control and management of council, such as public recreation reserves and parks, libraries, day-care centres, public pounds, boy scout and girl guide halls
- providing community enjoyment and benefit, such as camping grounds, sporting fields, tennis courts, public parks, public pools and significant community icons such as war memorials.

It is important that councils provide sufficient justification as to why the land sought meets the criteria and how the community would enjoy increased and better use of the land if vested.

Examples of land that will not be vested in councils

The NSW Government will retain Crown land that is of state significance. Criteria have been developed to guide decisions on what Crown land is of state significance and these criteria are that the land:

- currently provides, or is required for, planned core government services and infrastructure
- is part of a state or regionally significant system or network
- is of high environmental value at a state or regional scale and is required for addition to the conservation network, including land identified for future reservation
- is iconic or contains an iconic asset
- has or contains an item of state or heritage importance
- includes beaches, coasts, estuaries and adjoining, contiguous foreshore lands
- produces or has the identified and earmarked potential to produce significant income for the state.

Some examples of land that would not be considered for vesting in a council on the basis of the state land criteria are set out below. The following examples are intended to act as a guide only and are not exhaustive. Examples include land that:

- is required for the delivery of core state government services and infrastructure, such as land used for hospitals, police force purposes and schools
- does not have any identified local purpose and does not deliver local benefit or services to the local community
- has state heritage items or sites of significance, such as Aboriginal places, buildings, objects, gardens, natural landscapes, archaeological sites, shipwrecks, relics, streets, industrial structures, public buildings, shops, factories, houses, religious buildings, schools, conservation precincts, jetties, bridges and movable items such as church organs and ferries, or has potential to be recorded on the State Heritage Register or the Aboriginal Heritage Information Management System
- is considered to be iconic or contains an iconic asset, such as caravan and camping parks, state parks, national surfing reserves, sporting grounds and walking tracks. Examples include Hyde Park, Wentworth Park, Bondi Beach, Sydney Cricket Ground and Echo Point in the Blue Mountains.

Operational land and community land

Consistent with the CLM Act and the intent of the local land criteria, the majority of Crown land transferred to councils will be classified as ‘community land’ under the LG Act and will continue to be available to the community for social, recreational, sporting, environmental, cultural and economic purposes. This means that council must have a plan of management to govern the land’s use and management, providing the local community certainty about how the land will be used. Community land cannot be sold by councils.

Limited exceptions will be provided for Crown land that clearly should be transferred as ‘operational land’ under the LG Act. Land will only be transferred to councils as operational land in cases where the council can satisfy the minister that the land:

1. does not fall within any of the categories for community land under the LG Act
2. could not continue to be used and dealt with as it currently can if it were required to be used and dealt with as community land.

In relation point 1, an example includes land used for waste depots and recycling centres. The department recognises that uses such as this are truly operational.

In relation to point 2, this will generally be relevant where the use of the land requires a tenure to be granted that exceeds the maximum tenures under the LG Act—for example, where long-term residential caravan leases are required. In these circumstances, it is anticipated that the department will allow the land to be classified as operational but may require council to commit to certain obligations for the future use and development of that land in a formal agreement to ensure that there is appropriate control on land use and development.

The *Community Engagement Strategy*

The *Community Engagement Strategy* (the strategy) ensures that key decisions about Crown land are made in an open and transparent way by setting out engagement requirements for certain dealings under the CLM Act, including Crown land vestings.

The strategy acknowledges that communities’ needs vary and a range of engagement approaches are required to ensure community views are understood before important decisions are made.

It is a requirement of the strategy that community engagement is undertaken for proposed vestings where there is an impact on current community use and enjoyment. The consideration of current community use and enjoyment applies to both Crown land the community currently uses or enjoys and to land that it expects to continue to be able to use or enjoy.

Engagement about Crown land vestings is generally only required under the strategy if there is a potential adverse impact on current community use or enjoyment of the land.

Vesting Crown land will not require community engagement where the current use will continue and there is no impact on the community use and enjoyment. For example, where a reserve that is currently used as a park will be classified as community land and is categorised as a park under the *Local Government Act 1993* and will continued to be used as a park.

Crown land vesting will require community engagement where, post-vesting, the council plans to use the land in a different way to the current use, such as changing the use of the land from public recreation to conservation. Where land that is currently used by the community is proposed to be taken out of community use, for example, where council wishes to classify the land as operational, engagement will be required.

If the vesting is assessed to have a minimal impact on the community's use or enjoyment of the land, then a notification of the proposed vestings must be posted on the department's website for 28 days.

If the vesting is assessed to have a moderate impact on current community use or enjoyment, one of the consultation options must be conducted—options include a public submissions process or a community information event.

If the vesting is assessed to have a high impact on the community's use and enjoyment of the land, then the web notification period extends to 42 days; there must be one consultation method, and one method from the 'participate' category of engagement options must be carried out. Participatory options include an interactive workshop or community advisory or consultative committee meetings.

The feedback received from any engagement process must be taken into account as a factor in deciding whether to proceed with the vesting.

Further information on the [Community Engagement Strategy](#) is available from the department's website.

Native title

Native title is how Australian law recognises the rights and interests that Aboriginal people and Torres Strait Islanders hold in land and waters under their traditional laws and custom. Native title rights and interests are recognised and protected in the Commonwealth *Native Title Act 1993* and the NSW *Native Title Act 1994*. The NSW Government recognises the fundamental importance of these rights and the need to ensure compliance with native title legislation.

The CLM Act provides that transferring of ownership of Crown land to councils will be subject to any existing native title rights and interests prior to the transfer.

Councils have the following obligations under the CLM Act where land is vested subject to native title:

- the land cannot be sold
- to engage a qualified native title manager to oversee and provide written advice that any dealings that may affect native title are valid under native title legislation. The NSW Government has provided training and support to local councils to assist councils to comply with this obligation.

These obligations do not apply where the land is 'excluded land' under the CLM Act. Excluded land includes where native title has been determined by the federal court to be extinguished, has been surrendered, or where the Minister for Lands & Forestry has issued a native title certificate.

Native title certificates are only issued where detailed investigations by the department show that native title rights and interests in relation to the land have been extinguished or do not exist; however, this does not constitute a determination by the federal court.

Vestings under the Land Negotiation Program

About the program

The program delivers on the NSW Government's commitment to ensure that Crown land is held by the most appropriate landholder to achieve positive social, economic, cultural and environmental benefits for the people of NSW. The program was established in response to recommendations from the Crown Land Management Review.

The review found that certain types of Crown land are of state significance and need to be retained by the state government, but decisions about land of local value and interest are best managed locally. The review found that the NSW Government added marginal value by continuing to own locally-significant Crown land. It also found that local council ownership of this land would reduce unnecessary red tape between the local and state governments and make it easier for the local council to manage its overall local land assets.

The program enables land that meets the local land criteria to be transferred to councils for local ownership and appropriate land to be transferred to Local Aboriginal Land Councils (LALCs). The program involves voluntary negotiations between the NSW Government, the NSW Aboriginal Land Council (NSWALC), relevant LALCs, and relevant councils.

Features include:

- local ownership of Crown land to advantage local communities
- reduced red tape and reduced regulatory burden on local government
- more efficient and streamlined land management
- safeguards to protect state significant land
- recognition of the importance of land to Aboriginal people.

The program commenced in 2016 in the three local government areas of Tweed, Tamworth and Northern Beaches. In November 2017, the Minister for Lands approved 16 new areas to participate in the program, with five commencing in 2017–18, five in 2018–19 and six in 2019–20.

Other considerations

For vestings in local councils that occur as part of the program, the following specific considerations must be addressed:

- operational land and community land (refer to the 'Operational land and community land' section of this guideline)
- *Community Engagement Strategy* (refer to 'The Community Engagement Strategy' section)
- native title (refer the 'Native title' section)
- Aboriginal lands claims (see below)
- council consent (see below).

Aboriginal land claims

The program considers Aboriginal Land Claims (ALCs) made under the *Aboriginal Land Rights Act 1983* (ALR Act) during formal negotiations. Resolution of multiple ALCs within a negotiation area can be achieved through an Aboriginal Land Agreement (ALA) under Section 36AA of ALR Act, in return for transfer of land to Aboriginal Land Councils to deliver on cultural, social, environmental and economic outcomes.

Before any land under claim is transferred to a council, the claimant Aboriginal Land Council must agree in writing to the vesting. In practice this agreement will be documented in the ALA and the Aboriginal Land Council will agree under the terms of that agreement to withdraw the claim over the land that will be vested in council.

Council consent

When negotiations are finalised and before the transfer occurs, the agreement to vest transferrable Crown land will be formally documented through either a Local Land Agreement (LLA) or an ALA. At this time, council is required to undergo its respective approval process to obtain council consent of the final LLA or ALA.

Evidence of the council consent under Section 4.6 of the CLM Act will be through the execution of the LLA or the ALA by a properly authorised officer, after endorsement has been obtained by the elected council.

Process chart

Figure 1 on the next page shows the high-level process for one-off vestings.

Process of vesting under the program

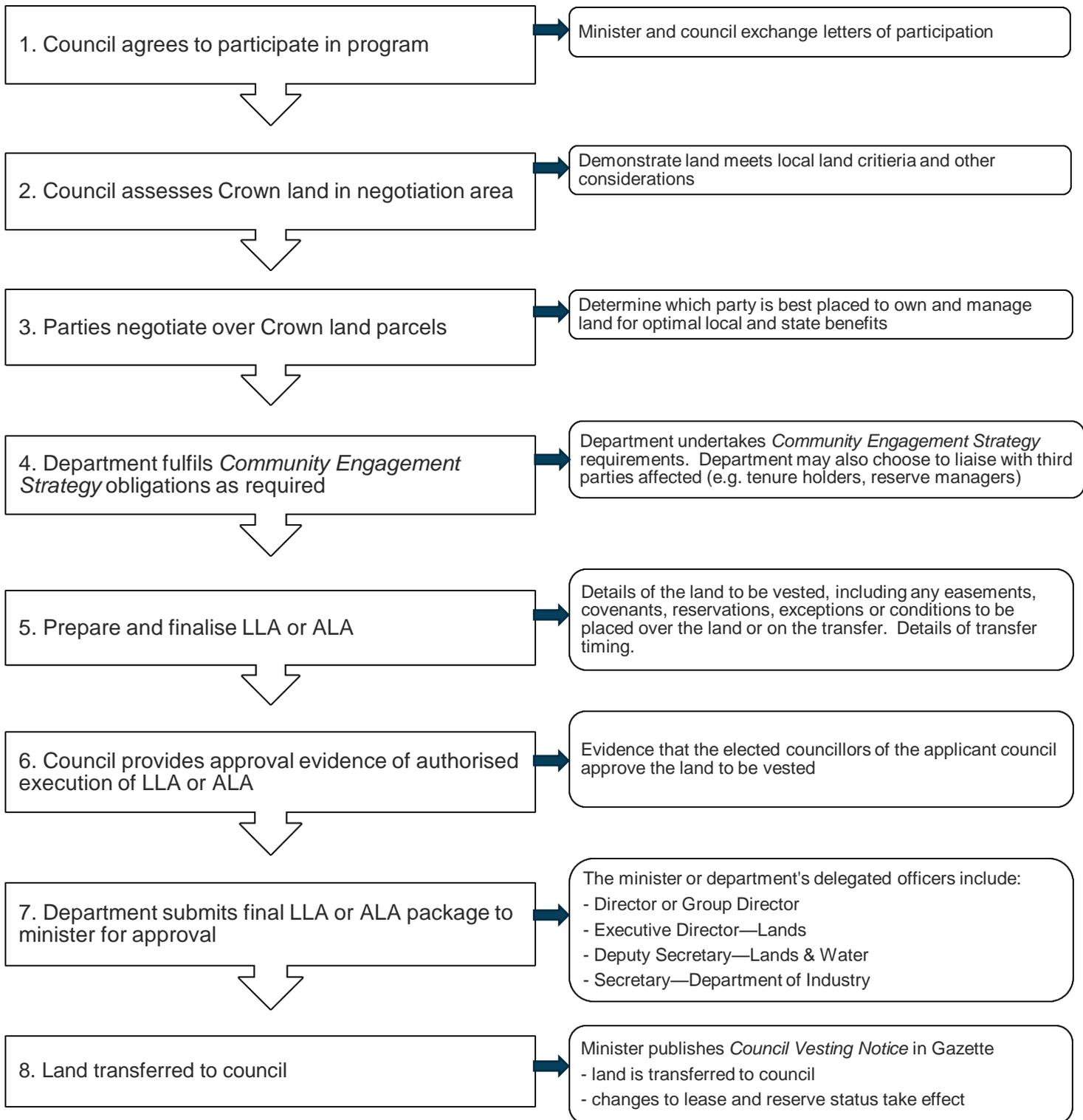


Figure 1. Steps 1 to 8 in the process of vesting

Vestings to address an exceptional local need

While Division 4.2 of the CLM Act is intended to be used almost exclusively under the program, councils have a limited ability to apply to the department for a vesting. Councils can only apply where they can demonstrate there is an exceptional need for locally significant Crown land to be vested in them. This will occur in limited circumstances where there is:

- strong ‘public interest’ to do so and a ‘public good’ would be achieved through doing so
- an exceptional local need or circumstance to justify a ‘one-off vesting’.

Although the council must demonstrate that the Crown land in question meets the local land criteria, this is not sufficient to justify a vesting outside the program, and the council must address a number of other considerations.

Defining ‘public interest’ and ‘public good’

The NSW Ombudsman describes public interest as referring to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens.

The CLM Regulation for the purposes of Division 4.2 describes a public good to be a good that is neither excludable nor rival—meaning that people cannot be prevented from using a public good and one person’s enjoyment of a public good does not reduce another person’s enjoyment.

Public interest or public good as it relates to council vesting includes:

- significant, measurable local community benefit that could not be achieved through another mechanism
- a requirement that the vesting must occur in the short term (that is, cannot wait for expansion of the program to the relevant local government area).

Circumstances that may justify a one-off vesting

Examples where positive justification for a one-off vesting outside the program may be found include some or a combination of the following, where:

- an important community asset on Crown land is not being managed effectively in the best interest of the local community, ultimately resulting in reduced use, capacity for multi-use, community benefit and public good and there is confidence that ownership and management by council would remedy this situation
- a council can make a case to the department that their ownership and management of the Crown land will provide them with a significantly increased ability to manage the land and assets to realise greater community benefits for public recreation and multi-use, than is currently enjoyed
- where a council intends to or needs to make a significant financial investment on Crown land for which they are the reserve manager—in the situation of a high use community asset such as a swimming pool or sports field that requires upgrade, renovation, augmentation or significant maintenance, especially to protect public health and safety. In situations where such an investment cannot be provided for under the Public Reserves Management Fund Program or other avenues available to council, but where security of council ownership of Crown land would justify their investment in it, vesting may be seen to meet the public interest/good case
- where a council has already made significant financial investments in infrastructure on Crown land for which they are the reserve manager to allow for public good and community benefit and are seeking ownership of the land for continued management to provide security for any future investments and community benefit

- where timing is a critical factor for a council and they are unable to delay the vesting until the program may be implemented in their area, as this may result in continued loss of community benefit and reputational risks to council and the NSW Government
- where the public interest/good case can be demonstrated to far outweigh any potential loss of state revenue by vesting high-value Crown land and assets in councils.

These are examples only and justification of the decision to approve a one-off vesting is at the discretion of minister or an authorised delegate.

Preparing a one-off vesting application

Council must submit a one-off vesting application to the department seeking transferrable Crown land to be vested in them.

Evidence to be included with application

The application must demonstrate that the land meets one or more of the local land criteria, is suitable for local use and that there is an exceptional need for the Crown land to be vested in them.

- **Local land criteria**—specific references must be made to which of the local land criteria has been demonstrated and how
- **Land is/will be suitable for local use**—any additional evidence to demonstrate that the land is or would be suitable for local use should be provided.

Evidence that the land is currently suitable for local use could include; asset and infrastructure information on the site for that purpose; expenditure by council on the site for that purpose; a plan of management; or a 355 Committee established under the LG Act for that purpose.

Evidence that the land will be made suitable for local use could include a minuted resolution that confirms council's proposed use of the land for a public/community purposes; proof that the current zoning supports the proposed use; a plan of management for the site outlining the proposal including timeframe for achievement of milestones and expected financials.

The department will need adequate evidence to demonstrate that future planning/development proposals for local use will be activated and brought to completion after any vesting.

- **Exceptional need**—as set out above, the application must demonstrate that there is:
 - strong 'public interest' to vest and a 'public good' would be achieved through doing so
 - an exceptional local need or circumstance to justify a 'one-off vesting'.

This should include any local matter that has the potential to be resolved by the one-off vesting and the positive outcomes that would be achieved for the benefit of the local community.

Other considerations

The application must also demonstrate that a number of other considerations have been addressed including:

- operational land and community land (see the section of this guideline with this name)
- *Community Engagement Strategy* (see the section with this name)
- native title (see the section with this name)
- Aboriginal Land Claims (refer section below)
- council consent (see below)
- evidence standard (see below).

Aboriginal Land Claims

If council is interested in having Crown land vested in them that is subject to an Aboriginal Land Claim (ALC), written consent is required under Section 4.6(1)(c) of the CLM Act from the relevant claimant Local Aboriginal Land Council and/or NSW Aboriginal Land Council.

Council must demonstrate in their application that they have consulted with the relevant claimant Aboriginal Land Council and have their consent to the vesting, or at the very least that council are attempting to seek consent. If consent has been received it must be provided with council's application.

The written consent of the claimant Aboriginal Land Council to the vesting will be a precondition of any vesting occurring.

Council consent

Evidence of the council consent to the vesting must be provided in order to satisfy the Section 4.6(1)(b) CLM Act requirement that council has agreed to have the land vested in them. This will involve evidence in writing of appropriate endorsement by the elected councillors or an appropriately delegated officer who has the power to accept land into the council's ownership.

Assessment of a one-off vesting application

When the council application is complete and all the required supporting information has been received, the department will undertake a thorough assessment, ensuring all the considerations set out above have been addressed.

The department must balance any positive considerations against any potential negative considerations that the one-off vesting may cause.

Potential negative considerations may include:

- where high-value Crown land is vested in council for nil consideration, the state will suffer a loss of future revenue, and it may be more appropriate for a council to utilise the provisions under the *Land Acquisition (Just Terms Compensation) Act 1991*, which would result in compensation being paid for the acquired land
- if there are concerns that council may not have the capability/capacity to adequately remediate any contaminated land, resulting in increased risk to public health and the environment
- lack of certainty around council's future investment in the site
- competing stakeholder interests in ownership of the site, including interests of community and indigenous groups.

Process chart

Figure 2 on the next page illustrates the high-level process for one-off vestings.

Process of vesting to meet an exceptional need

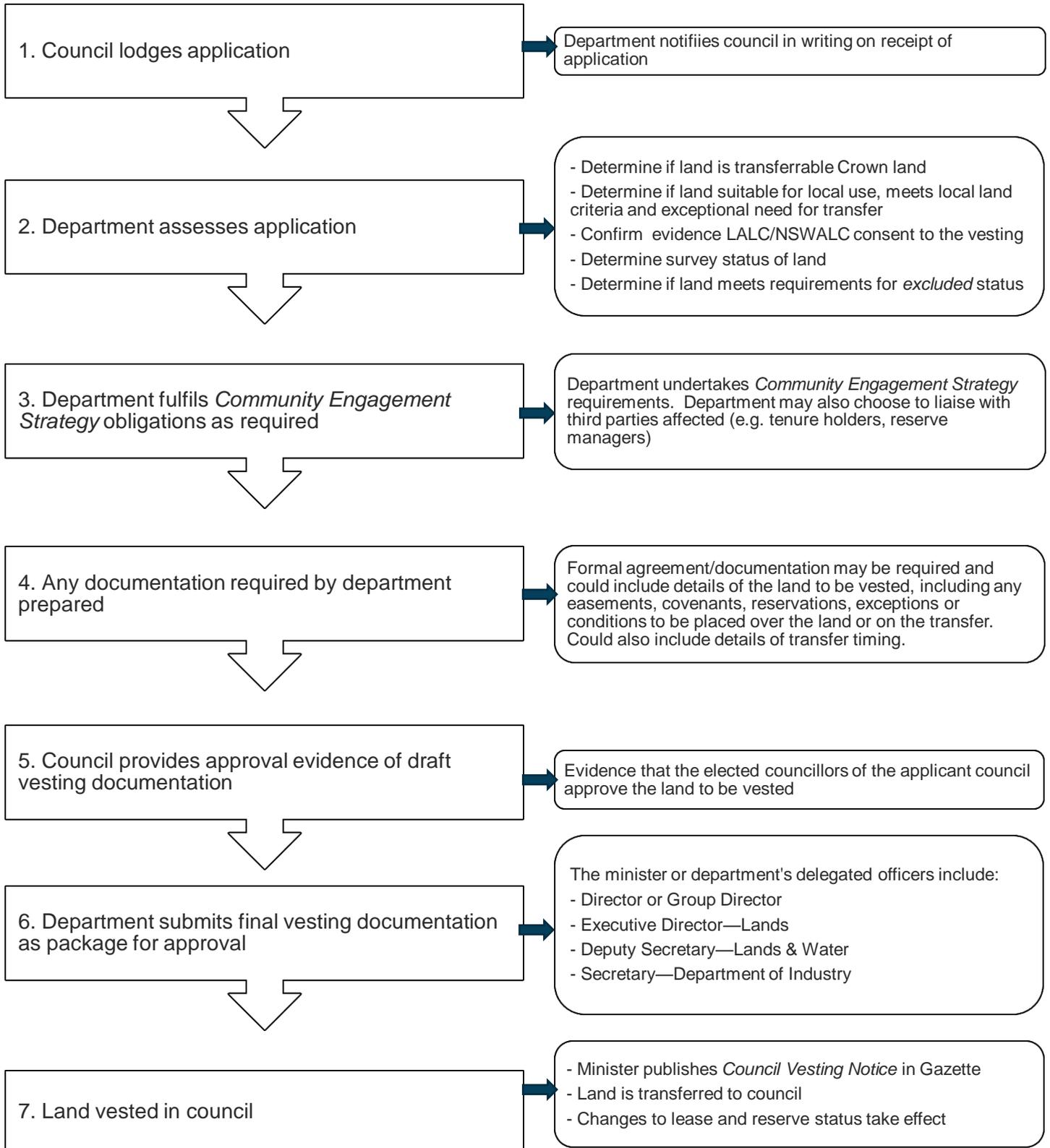


Figure 2. Steps 1 to 7 of vesting to meet an exceptional need